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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the rule of Illinois Brick Company v. Illinois bar Clayton Act section 4 claims of retail purchasers against manufacturers where the manufacturers horizontally agreed to raise retail prices, but where the manufacturers sold to retail purchasers indirectly through captive intermediary dealers?

2. Does Illinois Brick apply to preclude claims by retail purchasers where there is no wholesale market in which the price fixers compete?

THE PARTIES BELOW

Petitioners, who were Appellees in the Court of Appeals, are the States of California, Arizona, Florida, Oregon and Washington. The Petitioner States are plaintiffs in the District Court. Respondents, Appellants in the Court of Appeals, are defendants in In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, MDL-150 WPG, which is pending in the United States District Court for the Central District of California.*/

*/ The Respondents are: Atlantic Richfield Company; Cities Service Company and Cities Service Oil Company; Exxon Corporation; Gulf Oil Corporation; Mobil Oil Corporation; Phillips Petroleum Company; Shell Oil Company; Standard Oil Company of California; Standard Oil Company (Indiana); Standard Oil Company (Ohio); Sun Oil Company, Inc.; Texaco, Inc.; and Union Oil Company of California.

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The States of California, Arizona, Florida, Oregon, and Washington, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on November 9, 1982.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 691 F.2d 1335 (attached as Appendix A). The District Court's opinions are reported at 523 F.Supp. 1116 (attached as Appendix B), and 497 F.Supp. 218 (attached as Appendix C).

JURISDICTION

The Court of Appeals entered its opinion on November 9, 1982. Petitioners' timely petition for rehearing was denied on March 1, 1983, and this petition for certiorari was filed within ninety days of that date. Petitioners invoke this Court's jurisdiction under 28 U.S.C. section 1254 (1).

STATUTES INVOLVED

This case involves 15 U.S.C. section 1 (Sherman Act §1) and 15 U.S.C. section 15 (Clayton Act §4), set out verbatim in Appendices D and E, respectively.

STATEMENT OF CASE

The decisions below present a new and troubling application of the doctrine of Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, an application which frustrates the antitrust enforcement efforts of five state attorneys general and which immunizes an economically powerful industry from antitrust liability.

Petitioners Arizona, California, Florida, Oregon, and Washington (hereinafter plaintiffs) brought these antitrust actions at various times from 1973 to 1977. The States sued on their own behalf, on behalf of alleged classes of natural persons on behalf of alleged classes of governmental entities, and as parens patriae on behalf of their citizens

pursuant to 15 U.S.C. section 15c.^{1/} The federal courts have jurisdiction over the claims at issue in this petition pursuant to 15 U.S.C. section 1337.

The complaints charge 15 major oil companies (defendants) with retail price-fixing of refined petroleum products, primarily motor gasoline and heating fuel, in violation of the Sherman Act section 1 (15 U.S.C. § 1). They seek recovery for the States, their classes, and their citizens pursuant to Clayton Act section 4 (15 U.S.C. § 15) and the *parens patriae* statute (15 U.S.C. § 15c) for overcharges attributable to horizontal retail price-fixing by defendants and their co-conspirators. Plaintiffs also seek to recover the damages that they, their classes, and their citizens suffered due to elevated prices charged by non-conspiring unbranded stations, which were able to raise their retail prices under the umbrella of defendants' price-fixing.

^{1/} Although plaintiffs have brought these actions as *parens patriae*, the bulk of the damages suffered by consumers occurred before September 30, 1976, the effective date of the *parens patriae* statute. Thus, most of the consumer claims can only be maintained in a class action under Federal Rules of Civil Procedure, Rule 23.

Defendants are major integrated oil companies that produce and buy crude oil, refine it into gasoline and other products, and sell these products in bulk to governmental and commercial accounts and at branded retail outlets to the motoring public. Defendants owned most of these retail outlets and operated some of them with their own employees, but almost all of the branded retail outlets were actually operated by franchised dealers. While these dealers were nominally independent businesses, they in fact sold gasoline solely with defendants' permission, which could be withdrawn at any time.

In particular, the dealers could sell only their franchisor's brand of gasoline, so that there was never an intervening wholesale market between defendants and their dealers. Defendants could not and did not compete with each other for sales to dealers. While defendants purported not to set the precise retail price charged by their dealers, they in fact suggested retail prices to their dealers, strongly counseled them to post these prices, and disciplined and terminated dealers who did not maintain proper price levels.

Because there was no wholesale market for sales to dealers, and because the independence of defendants' dealers was illusory, defendants conspired among themselves to raise and stabilize prices in the retail market for gasoline, the only market in which they competed. This is the conspiracy alleged by the plaintiff States and later confirmed by the evidence

after discovery, but ignored by the courts below, which chose to analyze plaintiffs' allegations as charging a wholesale conspiracy.

Immediately after this court's decision in Illinois Brick Co. v. Illinois, supra, 431 U.S. 720, defendants began to argue that their distribution system fit within the rule of that case. Specifically, they argued that any purchases made by retail purchasers from dealers were indirect within the meaning of Illinois Brick, so as to immunize defendants from liability for any price-fixing activity. Agreeing with defendants, the district court ruled on August 26, 1980, (1) that plaintiff States could not recover for purchases they made from dealers who were not shown to be co-conspirators or to be controlled by a defendant, (2) that plaintiffs could not claim dealers were co-conspirators in a vertical price-fix without naming them as defendants, and (3) that plaintiffs' umbrella claims^{2/} were barred by the rationale of Illinois Brick. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (C.D. Cal. 1980) 497 F.Supp. 218. Subsequently, on September 30, 1981, the district court denied the States' motions

^{2/} State of Washington v. American Pipe and Construction Co., et al. (W.D. Wash. 1968) 280 F.Supp. 802; In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation (W.D. Wash. 1981) 530 F.Supp. 36.

for certification of their classes of retail purchasers, solely on the ground that Illinois Brick barred recovery on most of the consumers' purchases and that, in any attempt by the States to prove a control exception of Illinois Brick, individual issues would predominate. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (C.D. Cal. 1980) 523 F.Supp. 1116.

After the district court certified these decisions for appeal pursuant to 28 U.S.C. section 1292(b), the Court of Appeals for the Ninth Circuit accepted appeals of the two orders and consolidated them for hearing and decision. The Court of Appeals affirmed both orders. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1982) 691 F.2d 1335. While the court expressly declined to decide whether Illinois Brick applies to plaintiff States' claims (In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (9th Cir. 1982) 691 F.2d at 1338, fn. 1), it held, assuming Illinois Brick does apply: (1) that plaintiffs' umbrella claims are barred by the rationale of Illinois Brick, id. at 1338-1341, (2) that plaintiffs must name as parties any dealers with whom they charged defendants had a resale price maintenance conspiracy, id. 1341-1344) and (3) that proof of an Illinois Brick control exception

necessarily requires proof of individual questions sufficient to defeat class treatment. Id. at 1342-1343. (Although the court ruled that control could not be proved on a class-wide basis, it in fact did not decide what constitutes Illinois Brick control in general or in these actions. Ibid.)

REASONS FOR ALLOWANCE OF THE WRIT

A. INTRODUCTION

These actions were brought by the Attorneys General of five states to enforce the antitrust laws on behalf of these States, their citizens, and local governments, the victims of a massive horizontal price-fixing scheme undertaken by an economically powerful industry. The courts below ruled that this court's decision in Illinois Brick rendered them powerless to vindicate the rights of these victims. Because these rulings apply Illinois Brick in a novel fashion to undermine the policies of the antitrust laws and to immunize defendants and future price-fixers from any liability whatsoever, precisely contrary to the expressed purposes and goals of the Illinois Brick decision, plaintiffs respectfully petition this court to overturn the rulings below.

B. THE COURTS BELOW EXTENDED
ILLINOIS BRICK TO DEFEAT THE
ANTITRUST POLICIES ADVANCED
BY THIS COURT

1. The facts in the present action
are dispositively different from
those in Illinois Brick.

Plaintiffs have alleged, and have now shown through discovery, that defendants horizontally agreed to raise and stabilize the retail price of gasoline purchased by millions of consumers throughout the United States.^{3/} The courts below, however, interpreted this Court's decision in Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, to require that these injured consumers be denied compensation and that defendants forever be immune from liability for almost all of the injury their conspiracy caused. (A small portion of defendants' sales was direct to consumers through company-operated stations and hence not within the Court's Illinois Brick rulings.)

The Illinois Brick decision established a new rule of antitrust liability that was designed, in the Court's words, to further "the longstanding policy of encouraging vigorous private enforcement

^{3/} Discovery in these cases has proceeded during the pendency of these interlocutory appeals. If certiorari is granted, plaintiffs will move to supplement the record to include a summary of the evidence developed subsequent to the filing of these appeals in the Ninth Circuit.

of the antitrust laws, see, e.g. Perma Life Muffers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed. 2d 932 (1968) . . . " supra, 431 U.S. at 745. The decision held that, if manufacturers fix the wholesale price of goods they sell in a wholesale market to middlemen, the manufacturers are not liable under Clayton Act section 4 (15 U.S.C. § 15) to the middlemen's customers for any damages passed on by the middlemen into the resale market. The fundamental question raised by this petition is whether this rule can be extended to an entirely different fact situation to immunize from liability manufacturers who conspire horizontally to fix prices at the retail level.

As this Court has recently recognized, the question of whether Clayton Act section 4 allows plaintiffs to recover cannot be answered in a vacuum. Instead, "the question requires us to evaluate the plaintiffs' harm, the alleged wrongdoing by defendants, and the relationship between them." Associated General Contractors of California, Inc. v. California State Council of Carpenters (1983) __ U.S. __, 103 S.Ct. 897, 907 (footnote omitted). Instead of performing this required analysis, the district court held that, regardless of plaintiffs' harm, regardless of defendants' wrongdoing, and regardless of the relationship between them, Illinois Brick precludes recovery.

Plaintiffs have alleged, and the evidence shows, that defendant oil companies fixed the retail prices at which their gasoline was sold. Unlike the Illinois Brick defendants, the oil company defendants here have necessarily fixed the retail prices and not the wholesale prices, because in major branded gasoling marketing, unlike in Illinois Brick, there is no wholesale market in which to fix prices. Defendants' dealers are captive—they can only buy their gasoline from the defendant whose trademarked station they tend. Defendants did not compete for wholesale sales to dealers and did not fix dealer wholesale prices—they had no reason to do so. Hence, although in form defendants mostly sold indirectly to retail consumers, in reality they horizontally agreed on the retail price level because the retail market was the only place they competed.

2. The present case represents an unwarranted extension of Illinois Brick.

The fact situation described above must be measured against the intended goals of Illinois Brick. The Illinois Brick decision was designed to advance three important interdependent antitrust policies:

(1) prevention of duplicative recovery under Clayton Act section 4 in the absence of a "passing-on" defense, supra, 431 U.S. at 730-731, (2) avoidance of complicated proof of "passed-on" overcharges, id. at 731-732, and (3) vigorous enforcement of the antitrust laws, id. at 733-735. The new extension of Illinois Brick endorsed by the courts below frustrates rather than furthers these policies.

a. Plaintiffs' claims raise no threat of double recovery.

The Illinois Brick decision was designed to avoid the threat of double recovery inherent in Clayton Act section 4 if both the middleman and secondary purchaser can sue for the same overcharge. But no such threat is present here. If, as plaintiffs allege and as the facts show, defendants agreed to raise and stabilize the retail price of gasoline, the dealers have nothing to sue for since they did not buy the gasoline at retail, they sold it, and since they charged rather than paid the elevated retail prices.

As this Court recently recognized, to be entitled to recovery a plaintiff ordinarily should be "a consumer [or] a competitor in the market in which trade was restrained." Associated General Contractors of California, Inc. v. California State Council of Carpenters, supra, 103 S.Ct. at 909. Defendants' dealers are obviously not consumers in

the retail gasoline market; nor can they claim as "competitors" in the retail market that overcharges to retail consumers damaged them in any way. Thus, under the standard of Associated General Contractors, dealers cannot recover for these retail overcharges, and the only parties who can be allowed to recover are the injured retail consumers who paid the higher prices.

The problem here is entirely different from the oft-noted possibility that, under Illinois Brick and Hanover Shoe Inc. v. United Shoe Machinery Corp. (1968) 392 U.S. 481 [88 S.Ct. 1231, 30 L.Ed. 2d 1231], a middleman can sometimes realize a windfall recovery if he manages to pass overcharges on to his customers. Here, the oil companies' horizontal conspiracy raised the prices that their captive middlemen dealers charged, not the prices they paid, so there is no sensible ground on which the dealers can sue to recover the overcharges.

b. Plaintiffs' claims raise no complicated issues of pass-on.

In Illinois Brick, the indirect purchaser was not allowed to sue because it was too complicated to estimate the amount of damage passed-on to him through the intermediate (contractor) market. In this case, there is no intermediate market and therefore no pass-on—defendants fixed the retail price that the consumers paid and should be liable for elevating the

retail prices on which they agreed. Damages would be measured by the elevation of the retail price, not by the amount of wholesale price elevation passed on.

Indeed, as the prior subsection demonstrates, the only theory under which dealers could recover would be that the retail price-fix was somehow "passed back" to them by defendants in setting the dealer tankwagon price to reflect the agreed-upon retail prices. The evidence shows that defendants tried to establish dealer tankwagon prices which would give dealers appropriate margins in light of the fixed retail price levels. But this "pass-back" theory would suffer from the complexities, uncertainties, and related infirmities of the "pass-on" theory in the Illinois Brick situation and hence could not prevail.

In fact, it is difficult to imagine antitrust rulings better designed to complicate and thereby discourage enforcement than those below. These decisions require plaintiffs to name as parties defendant every retail gasoline dealer in five states and to prove on a dealer-by-dealer basis the issue of market control, an issue which can be readily demonstrated on a market-wide basis. Phillips v. Crown Central Petroleum Corp. (4th Cir. 1979) 602 F.2d 616, 626; Federal Rules of Evidence, Rules 703-705; Manual for Complex Litigation section 2.71. Thus, the decisions below are fraught with the complexity Illinois Brick was designed to avoid.

- c. The decisions below defeat Illinois Brick enforcement objectives by immunizing defendants from suit.

The central goal of Illinois Brick was to strengthen antitrust enforcement by reposing the full right of recovery in the direct purchaser.^{4/} As subsections a. and b. above demonstrate, there is no way consistent with Illinois Brick and Associated General Contractors for dealers to bring the action which the States have brought. Thus, if plaintiffs and their classes cannot recover, defendants are completely immune from suit.

Defendants glibly deny that they have escaped liability for their conspiracy by pointing to Bogosian v. Gulf Oil Corp. (3d Cir. 1977) 561 F.2d 434, cert. den. (1978) 434 U.S. 1086, as an example of the type of action dealers can bring. Unfortunately, the courts below accepted this fiction uncritically. Bogosian has nothing to do with the retail price-fix alleged by plaintiffs here; it concerns rather fanciful

^{4/} While this was the court's expressed intention in Illinois Brick, empirical study indicates that this goal has not been achieved, even when (unlike in the present cases) the direct purchaser can sue. Sarris, The Efficiency at Private Antitrust Enforcement: The Illinois Brick Decision and Its Implications (1979 University Microfilms International) No. 7926844, pp. 193-213.

allegations of consciously parallel interdependent conduct resulting in tying arrangements between major oil companies and their branded dealers designed to eliminate the dealers from a wholesale market for gasoline. Id. at 447-448. See, id. at 458-460 (Aldisert, J. dissenting).

No one denies that dealers can and do file antitrust suits against oil companies; plaintiffs do submit that there is no rational theory under which dealers would be allowed to duplicate the present action. Bogosian does nothing to call this assertion into question. Bogosian concerns an entirely different theory of recovery, involving completely distinguishable injury to a different set of plaintiffs. Hence, the pendency of Bogosian does not raise the specter for defendants of double liability on the same cause of action. Between plaintiffs here and plaintiffs in Bogosian, only one might be correctly characterizing defendants' actions, but each has an equal right to prove its allegations, and defendants have no right to use the allegations of one set of plaintiffs to defeat the allegations of another set of plaintiffs.

3. The lower courts erroneously assumed that the present case falls within the rule of Illinois Brick.

The courts below focused on the fact that defendants exacted from their dealers a so-called "dealer tankwagon price" for the gasoline the dealers sold, and, contrary to plaintiffs' allegations and to the facts, treated the conspiracy as a horizontal one to fix tankwagon prices coupled with a vertical one to fix retail prices.^{5/} In reality, this dealer tankwagon price is nothing more than a reflection of the retail price defendants horizontally agreed to impose on the marketplace.

Proceeding under the erroneous presumption that defendants colluded on tankwagon rather than retail prices, the courts below equated the tankwagon price to the wholesale price which was actionable under Illinois Brick. However, a realistic appraisal of the fact situation presented here reveals the obvious: a captive marketer who can sell only his franchisor's product is not an independent intervening market within the meaning of Illinois Brick, and a tankwagon price which is merely set to reflect a horizontally fixed retail price is an inadequate

^{5/} This failure to accept plaintiffs' allegations was in itself error. Associated General Contractors California, Inc. v. California State Council of Carpenters, supra, 103 S.Ct. at 902.

foundation on which to rest the entire burden of antitrust enforcement under Illinois Brick.

The Fourth Circuit, in analyzing a horizontal retail price-fix by independent oil companies who sold through dealers, perceptively noted that in the retail petroleum industry the horizontal/vertical distinction advanced by defendants there and adopted below in this case is an empty fabrication:

"[T]he division of a price-fixing scheme such as that found here into 'horizontal' and 'vertical' components is, in some measure, an abstraction. The horizontal agreement would have been worthless if Crown had not the power to control the retail prices charged by its dealers. The point of the horizontal conspiracy was to stabilize the retail price market, and an agreement with competitors to hold retail prices steady would not work without control over those prices. The existence and duration of the horizontal conspiracy, then, is itself some measure of proof that Crown was able to control the retail prices its dealers charged." Phillips v. Crown Central Petroleum Corp., supra, 602 F.2d 616, 626 (footnote omitted, emphasis in original).

The decisions below are thus little more than examples of convenient but erroneous labeling. By calling sales to dealers a "wholesale market," by calling the dealer tankwagon price a "wholesale

price," and by calling a franchisor's captive dealers "direct purchasers" and consumers "indirect purchasers," one can of course rewrite the facts of this case into a rough image of Illinois Brick. To do so, however, disposes of the present case readily but flouts the enforcement objectives repeatedly espoused by this court in Illinois Brick and elsewhere.^{6/} This Court has cautioned, in light of the Clayton Act section 4's expansive remedial purpose, that courts must not take this technical, semantic approach in determining who is entitled to sue. Pfizer, Inc. v. Government of India (1978) 434 U.S. 308, 313.

Illinois Brick was founded on two interlocking premises. One was that the direct purchaser would always be able to sue the price-fixer, so that there would be no hiatus in antitrust enforcement. The second was that the existence of two levels of injured parties raised a threat of double recovery not contemplated by Congress in enacting Clayton Act section 4. Neither of the premises applies here, where the defendants competed in the retail but not in the (non-existent)

^{6/} Supra, 431 U.S. at 720-721; American Society of Mechanical Engineers v. Hydrolevel Corp. (1982) 456 U.S. 556, 570; Blue Shield of Virginia v. McCready (1982) __ U.S. __, 102 S.Ct. 2540, 2545.

wholesale market for sales to dealers, where defendants horizontally fixed retail prices, but where the courts below, by uncritically applying Illinois Brick, have precluded retail consumers from redressing retail injuries. Since the intermediary dealers cannot bring an action to recover overcharges they themselves charged their customers, the threat is quite real here, unlike in Associated General Contractors, that "[d]enying [plaintiffs] a remedy on the basis of [their] allegations in this case is . . . likely to leave a significant antitrust violation undetected or unremedied." Associated General Contractors of California, Inc. v. California State Council of Carpenters, supra, 103 S.Ct. at 911.

C. THE ERRORS OF THE COURTS
BELOW REQUIRE EXERCISE OF
THE COURT'S CERTIORARI
JURISDICTION

The importance of the questions raised by this petition, both for the present case and for the future course of antitrust enforcement, cannot be overstated. In the present action alone, millions of retail consumers have been barred from recovering damages for horizontal retail price-fixing. During the single year 1971, over 17 billion gallons of gasoline were consumed in highway usage in plaintiff States. Federal Highway Administration, Highway Statistics, 1971, 1972, and 1973 editions.

Assuming that about 90% of these sales were retail sales (Federal Energy Administration, Petroleum Market Shares (1975), p. 19), these actions involve price-fixing in the sale of over 15 billion gallons of gasoline a year.

Moreover, if defendants here are successful in converting Illinois Brick from a pro-enforcement rule of recovery into a blanket immunity from liability, the lesson will not be lost on the economy as a whole. Every industry with sufficient market power will be motivated to follow defendants' model and insert captive middlemen between itself and the victims of horizontal price-fixing. Sherman Act section 1 would thereby be effectively repealed for some of the nation's most economically powerful industries.

This result, plaintiffs submit, is an unacceptable blow to our economic system of unrestrained competition. Illinois Brick must not be blindly extended to a fact situation where its rationale does not apply. As this Court has recognized before in reconsidering its antitrust rulings, "Realities must dominate the judgment The Anti-Trust Act aims at substance." Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36, 47, citing Appalachian Coals, Inc. v. United States (1933) 288 U.S. 344, 360. If, as this Court has recently reaffirmed, "[a] principal purpose of the antitrust

private cause of action . . . is . . . to deter anticompetitive practices," American Society of Mechanical Engineers v. Hydrolevel Corp., *supra*, 456 U.S. at 572, and if "the antitrust private action was created primarily as a remedy for the victims of antitrust violations," *id.* at 1947, then this court must exercise its responsibility as the final interpreter of the antitrust laws to allow recovery by the intended victims of one of the most far-reaching horizontal conspiracies in the history of the United States economy.

Accordingly, this case raises "an important question of federal law which has not been, but should be, settled by this Court," Supreme Court Rules, Rule 17, so that certiorari should be granted. Certiorari is appropriate where rulings below "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States. . . ." Perma Life Mufflers, Inc. v. International Parts Corp., *supra*, 392 U.S. 134, 136, and where the case presents important issues under the antitrust laws. Albrecht v. Herald Co. (1968) 390 U.S. 145, 146; National Broiler Marketing Assn. v. U.S. (1978) 436 U.S. 816, 818.

The need for Supreme Court review is particularly acute where, as here, earlier Supreme Court decisions have left important issues unresolved and in need of clarification by earlier Supreme Court decisions. Securities and Exchange Commission v.

United Benefit Life Insurance Co. (1967) 387 U.S. 202, 207; Federal Trade Commission v. Travelers Health Association (1960) 362 U.S. 293, 297. This court will not hesitate to explain, modify, or even overturn its earlier antitrust decisions where "the need for clarification of the law in this area justifies reconsideration." Continental T.V., Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 47. Specifically, this court has not specified whether Illinois Brick can be extended to bar retail consumers' claims for a retail price fix; assuming such an extension is permissible the district court defeated Illinois Brick's underlying policies.

Even beyond the vital importance of the questions presented to future enforcement of the antitrust laws, the present action is itself so important that Supreme Court review is required. The rights of most adult citizens in five states to recover for injuries resulting from an unabashed horizontal retail price-fixing scheme will stand or fall on the resolution of the questions presented; the outcome will determine whether an entire industry can profit from horizontal price-fixing. When the substantial rights of so many people, involving such significant amounts of damage, are at issue, certiorari should be granted. Commissioner of Internal Revenue v. Standard Life & Accident Insurance Co. (1977) 433 U.S. 148, 151 ("substantially more than \$100 million is in dispute"); United States

v. Zazove (1948) 334 U.S. 602, 605, 613-614 fn. 17 ("the added potential liability . . . might well amount to billions of dollars"); Patterson v. Lamb (1947) 329 U.S. 539, 541 ("will hereafter affect, the status and claims of thousands of draftees. . .").

Plaintiffs do not assert a conflict among the Courts of Appeals. Given the interlocutory nature of the issues on appeal, it is not surprising that they have reached only one Court of Appeals. However, there is a conflict below which merits resolution by this court.

The one other reported decision on point, from the Southern District of New York in the Second Circuit, is in direct conflict with the decisions below. Soskel v. Texaco, Inc. (S.D.N.Y. 1981) 514 F.Supp. 578. In Soskel, the court rebuffed an attempt by defendant Texaco (a defendant in the present action) to apply Illinois Brick to a petroleum price control claim on the ground that the dealer stood between plaintiff and defendant. The ruling there was 180 degrees opposite the decisions in this case:

"[T]he rationale of the Illinois Brick doctrine does not apply here. That doctrine applies where there has first occurred a transaction between an indirect seller and a direct seller which involves, say, price-fixing, and subsequently another transaction between the direct seller and the plaintiff purchaser which passes along the consequences of the first

price-fixing. In such a case, the courts have confined the cause of action against the initial (indirect) seller to the party which purchased from that seller (with some exceptions), thus avoiding intractable computational problems.

"However, the plaintiffs in the case at hand appear not to allege a pricing violation in a prior transaction to which they were not a party, the consequences of which were then passed on to them. Rather, they allege that the pricing violation took place in the sale of gas to them, and that Texaco participated in and was otherwise responsible for the violation which took place in that transaction. Accordingly, the Illinois Brick rationale does not apply." 514 F.Supp. at 580.

Given the unlikelihood of these interlocutory questions reaching another Court of Appeals in the foreseeable future, if ever,^{7/} and the urgency of the questions presented, it is appropriate for this Court to grant certiorari to resolve the conflict between the Ninth Circuit and the Southern District of New York. Massachusetts v. United States (1978) 435 U.S. 444, 453.

^{7/} Soskel has not gone to judgment and appears to be near settlement. Soskel v. Texaco, Inc. (S.D.N.Y. 1982) 94 F.R.D. 201.

D. SUMMARY

The district court summarized the impact of its ruling as follows:

"This court is aware of the likelihood that its refusal to certify the proposed class means that there is no practical way in which damages may be recovered for most individual gasoline purchasers, no matter how much the constantly increasing prices that they have paid may have stemmed from antitrust conduct on the part of the wholesale suppliers. However, this is the mandate of the Supreme Court in Illinois Brick." Supra, 523 F.Supp. at 1121.

Plaintiffs have brought this petition because they believe this regrettable result was not the intended mandate of this court where there is no threat of duplicative recovery, where there is no other purchaser with even the theoretical power to bring suit and enforce the antitrust laws, where the consumers directly paid horizontally fixed prices (not passed-on overcharges), and where the litigation has been made markedly more complex by the lower courts' Illinois Brick interpretations. To the contrary, as this Court recently recognized, "[t]he legislative history of [Clayton Act section 4] shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets."

Associated General Contractors of California v. California State Council of Carpenters, supra, 103 S.Ct. at 904.

Plaintiffs submit that Illinois Brick has left open too many unanswered questions affecting substantial rights of too many persons for this Court not to step in and resolve the controversy. If Clayton Act section 4 is to serve its dual purposes of deterring violators and of compensating victims, Pfizer, Inc. v. Government of India (1978) 434 U.S. 308, 314, Illinois Brick must not be transformed by wooden application into a doctrine that immunizes even the most blatant antitrust offenses. Only this Court can provide the needed clarification of Illinois Brick to square the decision again with Clayton Act section 4's "broad remedial and deterrent objectives." Blue Shield of Virginia v. McCready, supra, 102 S.Ct. at 2545.

Respectfully submitted this 27th day of May
1983.

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APPENDIX A

**In re COORDINATED PRETRIAL PRO-
CEEDINGS IN PETROLEUM PRÓD-
UCTS ANTITRUST LITIGATION**

**STATE of California, et al.,
Plaintiffs-Appellants,**

v.

**STANDARD OIL COMPANY OF CALI-
FORNIA, et al., Defendants-Appellees.**

Nos. 81-5117, 81-5930.

**United States Court of Appeals,
Ninth Circuit.**

Argued and Submitted May 4, 1982.

Decided Nov. 9, 1982.

**Before ANDERSON, SKOPIL and CAN-
BY, Circuit Judges.**

CANBY, Circuit Judge:

These interlocutory appeals are before us under 28 U.S.C. § 1292(b). They arise from a group of antitrust actions brought against sixteen oil companies by the states of Arizona, California, Florida, Oregon, and Washington. The complaints, which are similar in all material respects, allege violations of the Sherman Act, 15 U.S.C. §§ 1 & 2. The portions of the complaints material to these

appeals allege that the defendant oil companies combined and conspired to raise or stabilize the prices of refined petroleum products.

The cases were filed at various times between July 1973 and February 1977. In August 1976, the Judicial Panel on Multidistrict Litigation transferred the then-pending cases to the Central District of California for coordinated pretrial proceedings. *In re Petroleum Products Antitrust Litigation*, 419 F.Supp. 712 (Jud.Pan.Mult.Lit.1976). Subsequent cases were filed directly in the Central District.

The plaintiff States sue in their proprietary capacity and on behalf of their citizens as *parens patriae* pursuant to section 4C of the Clayton Act, 15 U.S.C. § 15c. They also seek to represent classes of government entities and a consumer sub-class consisting of natural persons who purchased defendants' products prior to the September 30, 1976 effective date of the states' *parens patriae* authority.

The primary goal of plaintiffs in this action is the recovery of antitrust damages for allegedly inflated retail gasoline prices paid by the plaintiffs and the classes they seek to represent. The principal difficulty plaintiffs have faced is the Supreme Court's intervening announcement in *Illinois Brick*

v. *Illinois*, 481 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), that indirect purchasers of price-fixed goods may not maintain an antitrust damage action for overcharges passed on to them by direct purchasers from the defendant. According to the plaintiff States, an estimated 80 percent of the retail gasoline transactions at issue here involve indirect purchases from non-defendant retail dealers.

Shortly after the decision in *Illinois Brick*, the defendant oil companies moved to dismiss portions of the plaintiff States' complaints on various grounds, among them that plaintiffs are indirect purchasers barred by *Illinois Brick* from recovering damages. On August 26, 1980, the district court issued an order on the applicability of *Illinois Brick* to the instant proceedings. Portions of this order are the subject of the first interlocutory appeal.

The second interlocutory appeal is from a subsequent order of the district court denying plaintiffs' motion for certification of the consumer sub-class. The district court made the required certification of the two appeals and the plaintiffs filed timely petitions for permission to appeal. This court granted both interlocutory appeals and the cases were calendared together for oral ar-

gument. We now affirm the district court's orders in both cases.

I.

The first appeal is from the district court's certification to us of paragraphs "third" and "fourth" of its August 26, 1980 order.¹ At paragraph "third," the district court ruled: "[A]ll claims for damages based on purchases from firms that competed with the defendants but did not conspire

1. We note at the outset what is not before us. At paragraph "second" of the district court's order, the court ruled that plaintiffs may seek damages from the defendants "only as to direct purchases from the defendants, their co-conspirators, sellers with whom plaintiff had fixed-quantity, cost-plus contracts pre-dating the alleged violations, or entities owned or controlled by the defendants or their co-conspirators." The "cost-plus" and "control" situations referred to by the district court in its ruling are possible exceptions to the bar against indirect purchaser claims. *Illinois Brick*, 431 U.S. at 736 and n. 16, 97 S.Ct. at 2069 and n. 16. Although much of the appellate briefing in this case is concerned with the correctness of the district court's ruling in paragraph "second," the district court did not certify this paragraph to us. We trust we will not surprise counsel by expressing no opinion on the issues raised by this ruling.

with them to violate the antitrust laws are dismissed." Paragraph "fourth" states: "[T]he plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the conspiring retail dealers are joined as parties defendant." For the reasons set forth below, we affirm these rulings.

Paragraph "Third"

Paragraph "third" dismissed plaintiffs' claims for damages sought under an "umbrella" theory of liability.² Plaintiffs contend that defendants' successful price-fixing conspiracy created a "price umbrella" under which non-conspiring competitors of the defendants raised their gasoline prices to an artificial level at or near the fixed

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2. Plaintiffs claim standing to assert an umbrella claim under § 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

price. Since defendants are allegedly responsible for creating a market situation where conduct of this nature is possible, plaintiffs argue that defendants should be held responsible for damages resulting from their competitors' higher prices.

The umbrella theory is essentially a consequential damages theory. It seeks to hold price-fixers liable for harm allegedly flowing from the illegal conduct even though the price-fixing defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions. Since the decision in *Illinois Brick*, at least one district court has allowed plaintiffs to proceed under an umbrella theory. *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 530 F.Supp. 36 (W.D.Wash.1981). The Third Circuit, however, has expressly rejected its use. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979).

Although the Court in *Illinois Brick* was not faced with an umbrella claim, the rationale for its decision barring indirect purchasers from seeking antitrust damages must be considered in determining the viability of an umbrella theory of liability. In *Illinois Brick*, plaintiffs attempted to recover damages from defendants who allegedly had overcharged the sellers from whom the plaintiffs purchased. The plaintiffs claimed

that their immediate sellers passed on the overcharges to them. In rejecting the offensive use of a pass-on-theory,³ the Court noted the possibility of duplicative recovery if both direct and indirect purchasers could claim damages resulting from a single overcharge by an antitrust defendant. 431 U.S. at 730-31, 97 S.Ct. at 2066-67. The Court reasoned that, by concentrating the recovery in direct purchasers rather than among a broad class of potentially affected plaintiffs, the antitrust laws would be enforced

3. The Court had previously held that in a suit by a direct purchaser, an antitrust violator may not defend on the ground that the direct purchaser has not been injured because it had passed on the illegal overcharge to its own customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Illinois Brick*, the Court expressed a desire to maintain symmetry with its previous decision.

more effectively.⁴ The Court further noted the tremendous burden that would be placed on antitrust proceedings by the "massive evidence and complicated theories" necessary to measure and trace the effect of an overcharge through each step of the distribution chain, *id.* at 737, 97 S.Ct. at 2070, and the attendant complexities inherent in apportioning damages "among all potential plaintiffs that could have absorbed part of the overcharge." *Id.* at 741, 97 S.Ct. at 2072.

In *Mid-West Paper, supra*, the Third Circuit found the umbrella claim before it analogous to the pass-on issue involved in *Illinois Brick* because "in both situations the plaintiff seeks to recover for higher prices set by, and paid by it to, parties other than the defendants." 593 F.2d at 584. Given the fact that numerous factors influence a firm's pricing decisions, the court concluded that an umbrella claim is necessarily conjectural and speculative in nature. *Id.* at 584—

4. In *Blue Shield v. McCready*, — U.S. —, —, 102 S.Ct. 2540, 2546, 73 L.Ed.2d 149 (1982), the Court reiterated that in *Illinois Brick* it had concluded that "direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote." (citation omitted).

85. Moreover, ascertaining how and why a competitor of the defendant charged a certain price would mire the court in a complex economic proceeding of the type *Illinois Brick* sought to prevent. *Id.* at 585. The spectre of complicated, speculative proceedings combined with the potential for ruinous recoveries, well in excess of defendants' illegally earned profits, *id.* at 586, led the court to hold that purchasers from competitors of price-fixing defendants may not seek damages under an umbrella theory of liability.

The decision in *Mid-West Paper* is not without its critics. See *id.* at 595-99 (Higinbotham, J., dissenting in part); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166 n. 24 (5th Cir. 1979), cert. denied, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980); 93 Harv.L.Rev. 598 (1980). First, since the umbrella claimant in *Mid-West Paper* was a direct purchaser from a competitor of the defendants, there was no danger of duplicative recovery, a major concern of the court in *Illinois Brick*. Second, *Mid-West Paper* involved only one class of plaintiffs and a single level of distribution. Therefore, the concern in *Illinois Brick* over the complexities involved in tracing the effects of a conspiracy through several levels of manufacture and distribu-

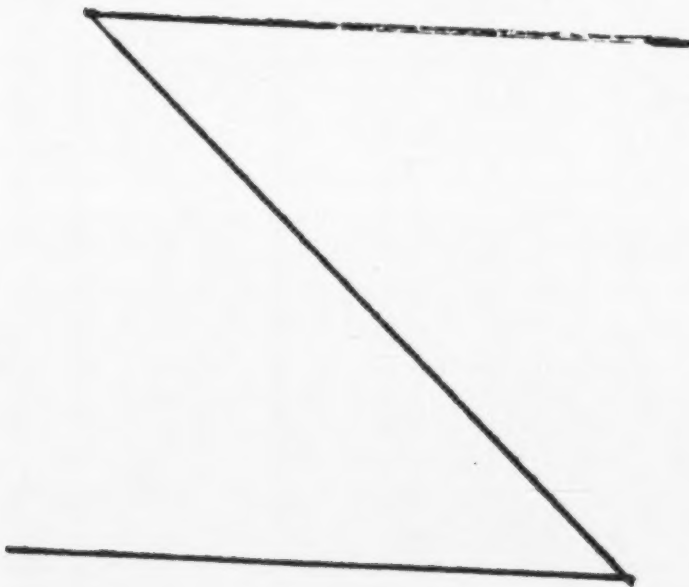
tion was not present. Third, proof of what the non-conspiring competitor may have charged absent the conspiracy need not involve evidence more complicated than that adduced in other antitrust proceedings. Fourth, the Court in *Illinois Brick* was concerned with prohibiting economically complex evidence only where it would threaten the effective enforcement of the antitrust laws by reducing the incentive of direct purchasers to sue. Allowing an umbrella claimant to sue for his injuries in no way reduces the incentive to sue of direct purchasers from the defendants. Fifth, although the possibility of ruinous recovery is not unimportant, this concern is more properly addressed to Congress. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979).

[1] The viability of an umbrella claim in the wake of *Illinois Brick* is an important issue of first impression in this circuit.⁵ We need not decide, however, whether, in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defend-

5. Prior to *Illinois Brick*, one court in this circuit allowed an umbrella claim. *Washington v. American Pipe & Construction Co.*, 280 F.Supp. 802 (W.D.Wash.1968).

ants can assert claims for damages against price-fixing defendants under an umbrella theory. In the case before us, the umbrella claimants purchased gasoline from independent marketers who, in turn, purchased their gasoline from independent refiners. These independent refiners manufactured a percentage of the independent marketers' supply and brokered the remainder of the marketers' supply from major refiners, i.e., the defendants.

For two reasons, we have little hesitancy in concluding that the limitations recognized in *Illinois Brick* bar umbrella claims in the context of the multi-tiered distribu-



tion chain alleged here.⁶ First, to the extent that plaintiffs seek recovery for overcharges for gasoline originally purchased from defendants by independent refiners, the overcharge to plaintiffs may simply result from a pass-on of the original unlawfully inflated price. If so, it falls squarely within *Illinois Brick*. Even if plaintiffs were somehow able to prove that there was no pass-on, and that the inflated prices in the non-conspirators' distribution chain

6. In *Blue Shield v. McCready*, — U.S. —, —, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982), the Court noted that two analytically distinct types of limitations have been imposed on the § 4 remedy: 1) those arising out of *Illinois Brick* and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), involving considerations of duplicative recovery and unwarranted evidentiary complexities engendered by speculative damage claims and 2) those arising out of claims that a particular injury is too remote from the alleged violation to accord a plaintiff standing under § 4. Because we decide this case on the basis of *Illinois Brick*, we need not decide whether plaintiffs meet the test of standing traditionally employed by this Circuit to determine remoteness under § 4. See, e.g., *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), cert. denied 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973). Cf. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) (collecting cases and suggesting a balancing analysis).

were the independent result of an umbrella effect, the danger of double recovery condemned by *Illinois Brick* would remain. The independent refiners would still have an enforceable claim for damages against the defendants for the entire unlawful overcharge to them, without reduction for damages suffered by plaintiffs. The result, if plaintiffs were to succeed here, would be liability of the defendants twice for the effects of the same overcharge.

The second reason that plaintiffs' claims are barred by *Illinois Brick*, wholly apart from the problems of pass-on and double recovery, is that they are unacceptably speculative and complex. Thus, any umbrella claims plaintiffs may assert for damages based on those purchases of gasoline not acquired originally from the defendants also must fail. A major theme in *Illinois Brick* is that the "feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4." *Blue Shield v. McCready*, — U.S. —, — n. 11, 102 S.Ct. 2540, 2546 n. 11, 73 L.Ed.2d 149 (1982). Although we recognize that the "difficulty of ascertainment [should not be] confused with a right of recovery," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66

S.Ct. 574, 580, 90 L.Ed. 652 (1946), we nevertheless must consider whether "a claim rests at bottom on some abstract conception or speculative measure of harm." *McCready, supra*.

[2, 3] Under an umbrella theory, the result of any attempt to ascertain with reasonable probability⁷ whether the non-conspirators' prices resulted from the defendants' purported price-fixing conspiracy or from numerous other pricing considerations would be speculative to some degree.⁸ When the fact of a multi-tiered distribution

7. To recover treble damages, plaintiffs must prove actual causation—"injury in fact." *Flintkote v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), cert. denied, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). Although the trier of fact may reasonably estimate the amount of damages, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946), a higher quantum of proof is required to establish "injury in fact." *Flintkote supra*; see *Story Parchment Co. v. Paterson*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931). Plaintiff is required to establish with "reasonable probability" the existence of the latter. *Flintkote, supra*.

8. In *Midwest Paper*, 596 F.2d at 584, the court listed complex pricing variables that exist when only one level of distribution is involved, including cost of production, marketing strategy, elasticity of demand, and price of comparable items.

system is imposed upon the above complex set of variables, the obstacles to intelligent inquiry become nearly insurmountable. The causal effect of each pricing decision would have to be pursued through the chain of distribution. Not only would we be required to speculate that plaintiffs were injured solely as the result of umbrella pricing, but also we would be required to sanction complex judicial inquiry into the pricing decisions of sellers remote from plaintiffs. We decline to do either, and accordingly hold that under the facts of this case, application of an umbrella theory is unwarranted.

Paragraph "Fourth"

[4] In an effort to circumvent *Illinois Brick*, plaintiffs suggested to the district court that they might seek to prove a resale price maintenance conspiracy between defendants and retail dealers. At paragraph "fourth," the district court ruled that plaintiffs must join retail dealers as defendants if they pursue a conspiracy claim.

Without benefit of specific factual allegations that the future amended complaint may contain, we express no opinion on whether a vertical conspiracy claim may be

appropriate in this case.⁹ Assuming such a claim may be stated, however, we find no error in the district court's ruling.

Absent joinder of retail dealers, serious risks of duplicative recovery and inconsistent adjudications would ensue. *In re Beef Industry Antitrust Litigation*, *supra*, 600 F.2d at 1148. If plaintiffs recovered dam-

9. Because plaintiffs have not amended their complaints to allege a vertical conspiracy, there is a question whether this issue should be held ripe for decision. See *Nickert v. Puget Sound Tug & Barge Co.*, 480 F.2d 1039 (9th Cir. 1973). Because the district court has indicated its intent to allow an amendment subject to the disputed condition, and because there is little possibility of an intervening event rendering decision unnecessary, *cf. id.* (certified question might be rendered moot by jury verdict), we exercise our discretion to decide the joinder issue in the interest of judicial economy. In so doing, however, we expressly leave unresolved issues involving the viability of vertical conspiracy claims in situations arguably put to rest by *Illinois Brick*. Nor do we express an opinion on any alleged distinctions between the "control" exception alluded to in *Illinois Brick*, 431 U.S. at 736 n. 16, 97 S.Ct. at 2070 n. 16 and conspiracy claims based on vertical coercion, *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1356 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

ages for a vertical conspiracy between defendants and non-party retail dealers, any of those dealers could prove in a subsequent action that they were not conspirators and, as direct purchasers, were entitled to damages arising out of the same events. In *Illinois Brick*, the Court expressly found unacceptable the risk of duplicative recovery created by allowing direct and indirect purchasers to claim damages resulting from a single transaction that violated the anti-trust laws. 431 U.S. at 730-31, 97 S.Ct. at 2066-67. *McCready*, —• U.S. at —, 102 S.Ct. at 2546.

We also cannot accept plaintiffs' contention that no duplicative recovery can occur here because there is no intervening market between the defendants and their retail dealers. We note that fifteen defendants in this action are named as defendants in other litigation where a certified class of lessee retail dealers, who bought gasoline from defendants during the period covered by the complaints in this case, similarly allege that defendants, through exclusive supply arrangements with their dealers, have eliminated horizontal competition at the wholesale level. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 447 (3rd Cir. 1977), cert. denied, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

We further reject plaintiffs' argument that an exception to a rule requiring joinder should obtain where, as here, the statute of limitations has run on direct purchasers. We note that the claims in *Bogosian, supra*, overlap the claims at issue here. Moreover, the record indicates that plaintiffs intend to seek damages up to the time of trial for a continuing conspiracy. Under these circumstances, dealer claims against defendants covering the last four years would not be time-barred. Plaintiffs' suggestion, therefore, does not remove the risk of multiple liability. Furthermore, we are unwilling to countenance *ad hoc* case-by-case exceptions to a rule of intended general application. See *Illinois Brick*, 431 U.S. at 743-45, 97 S.Ct. at 2073-74.

We accordingly uphold the ruling of the district court that if a proper vertical conspiracy claim is alleged, joinder of retail dealers is required to prevent a serious risk of multiple liability.

II.

The second interlocutory appeal is from the district court's order denying plaintiffs' motion to certify classes of indirect purchaser retail consumers pursuant to Rule 23(b)(3), Fed.R.Civ.P.

[5, 6] A decision denying class certification is reviewable on appeal only for abuse of discretion or for application of impermissible legal criteria. *Pattillo v. Schlesinger*, 625 F.2d 262, 264 (9th Cir. 1980); *Yamamoto v. Omiya*, 564 F.2d 1819, 1825 (9th Cir.1977). Although in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true, *Blackie v. Barrack*, 524 F.2d 891, 901 n. 7 (9th Cir. 1975), cert. denied, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976), the court also is required to consider the nature and range of proof necessary to establish those allegations. *Id.* at 901.

The district court ruled that if plaintiffs seek to by-pass the rule in *Illinois Brick*, any theory on which they might rely would raise predominantly individual questions relating to the relationships between the defendants and each of their approximately 35,000 retail dealers. We agree.

The plaintiffs argue that the "control" exception to *Illinois Brick*, 431 U.S. at 786 n. 16, 97 S.Ct. at 2070 n. 16¹⁰, is susceptible

10. At footnote 16, the Court in *Illinois Brick* implied that an exception to its rule barring indirect purchaser claims might exist "where the direct purchaser is owned or controlled by its customer."

of proof on a classwide basis without inquiry into the pricing decisions of the retail dealers. Plaintiffs propose to establish their claim by circumstantial evidence including lease and supply agreements between the defendants and their dealers, and marketwide price statistics. None of the leases or supply agreements at issue here, however, purport to allow the defendant oil companies to fix the retail dealers' prices to the public. Moreover, marketwide price statistics are insufficient evidence upon which to avoid *Illinois Brick*. A nationwide increase in gasoline prices may reflect nothing more than the fact that wholesale prices are important factors in retail pricing. Assuming *arguendo* that defendants engaged in a conspiracy to fix the wholesale price of gasoline, an across-the-board increase in gasoline prices may well indicate nothing more than the dealers' independent decisions to pass on wholesale overcharges to the consuming public.

Without giving the district court an opportunity to pass on the issue, we are unwilling at this stage of the proceedings to pronounce the precise contours of the "control" exception to *Illinois Brick* or to decide whether or not it may have application to the facts of the case. We do conclude, however, that if such an exception is applicable, the degree to which the individual

retail dealers may have exercised independent pricing discretion is important. Accordingly, individual questions involving the pricing decisions of 35,000 retail dealers will predominate and preclude class treatment.¹¹

[7-9] To the extent that plaintiffs' proposed vertical conspiracy claim may differ from its allegations of the "control" exception to *Illinois Brick*, we reach a similar conclusion.¹² Vertical price fixing, of course, is *per se* illegal. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n. 18, 97 S.Ct. 2549, 2558 n. 18, 53 L.Ed.2d 568 (1977). Supplier actions that might influence resale prices but which do not sufficiently induce avoidance of price competition, however, do not constitute vertical price fixing. *General Cinema Corp. v. Buena Vista Distribution*, 681 F.2d 594 at 597 (9th Cir. 1982); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 806 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). To prevail on a vertical price fixing claim, plaintiffs must show

11. Rule 23(b)(3). Fed.R.Civ.P. requires that common questions of law or fact predominate over any individual question.

12. In each instance, plaintiffs allege that defendants coerced their retail dealers into charging fixed prices.

"affirmative action" on the part of the oil companies which induced their dealers to charge certain prices. *General Cinema, supra*. They also must show that the dealers succumbed to such pressure. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355-57 & n. 3 (9th Cir. 1976), cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

[10, 11] Proof of a close conformity between wholesale and retail prices is insufficient to establish a vertical conspiracy claim on a class-wide basis. Absent common evidence of standard contracts that demonstrate control over the retail dealers' pricing decisions or some other readily demonstrable and equally convincing evidence, individual issues will predominate and render class treatment inappropriate. See *Chicken Delight, Inc. v. Harris*, 412 F.2d 830, 831 (9th Cir. 1969).¹³

13. In *Chicken Delight* the trial court initially certified a class with respect to claims of illegal "tying." When the time came to send class notices, plaintiffs sought to include in their description of the case a pricing issue relating to defendant's alleged coercive, extracontractual control over its franchisees' retail prices. We found the latter issue inappropriate for class treatment because, unlike the tying claim, it could not be tried upon the common evidence of the standard franchise contracts. We issued a writ of mandamus to correct the error.

[12] Because plaintiffs have failed to suggest any acceptable method of demonstrating on a class basis that the individual retail dealers lacked pricing discretion, they have not met their burden of showing that the proposed classes satisfy the requirements of Rule 23, Fed.R.Civ.P. *In re Hotel Telephone Charges*, 500 F.2d 86, 88 (9th Cir. 1974).

AFFIRMED.

APPENDIX B

**In re COORDINATED PRETRIAL PRO-
CEEDINGS IN PETROLEUM PROD-
UCTS ANTITRUST LITIGATION.**

No. MDL-150-WPG.

**United States District Court,
C. D. California.**

Sept. 30, 1981.

**MEMORANDUM OF DECISION
AND ORDER**

WILLIAM P. GRAY, District Judge.

[1] The plaintiffs in these consolidated antitrust actions against several major oil companies are the Attorneys General of the States of Arizona, California, Florida, Oregon and Washington. They have filed motions for the certification of a plaintiff subclass consisting of all natural persons * residing in their respective states who have purchased motor gasoline at retail within such states during the periods covered by the complaints. These motions have been extensively briefed and argued and submitted for decision. For reasons set forth in this memorandum, they are denied.

* Arizona has a slight variation that is immaterial here.

It has been obvious ever since these cases were filed that the principal goal of the plaintiffs is to accomplish a recovery of antitrust damages on behalf of their citizens who have been obliged to pay allegedly inflated prices at the retail gasoline stations. However, in 1977 the Supreme Court rendered its decision in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52

L.Ed.2d 707, which held that an indirect purchaser from a person that violates the antitrust laws may not recover damages. Most of the automobile owners that use gasoline produced by the defendants make their purchases directly from retail dealers, and only indirectly from the defendants that supply such dealers. Thus, the *Illinois Brick* decision necessarily dealt a traumatic blow to the plaintiffs' plans.

Subsequently, following the lead of *Royal Printing, Inc. v. Kimberly-Clark Corporation*, 621 F.2d 323 (9th Cir. 1980), and *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13 (3d Cir. 1978), I inferred an exception to the strict holding in *Illinois Brick* and announced the ruling that "... the plaintiffs will be allowed to recover from the defendants for overcharges passed on by entities owned or controlled by the defendants." See *In re Coordinated Pretrial Proceedings, etc.*, 497 F.Supp. 218 (C.D.Cal. 1980).

Thus, under the present posture of this litigation, even assuming that the plaintiffs will be able to prove a horizontal conspiracy by the defendants to fix retail gasoline prices, they must also establish that the dealers from whom the plaintiffs (or proposed class members) bought at inflated prices were owned by or under the control of the defendant suppliers.

Counsel and the court have expressed mutual awareness that it would be completely impracticable in this action to litigate the control relationships between the respective defendants and each of their many thousands of dealers in order to determine which of the millions of retail transactions could result in liability to the defendants. Under these circumstances, the question that has beset the plaintiffs is how they can hope to show, on a class action basis, that the defendants' control over all of their dealers was so pervasive that they could fix the retail prices of gasoline without any uncontrolled discretion being exercised by the gasoline station operators that made the sales. In other words, how could the participation of the retail dealer be disregarded in the setting of prices at which sales are made to the public.

I have had considerable sympathy for the plaintiffs as they faced the problem of *Illinois Brick*, and have given them somewhat extended opportunity to develop and assert just how they propose to surmount it. After several valiant written and oral attempts, the answer is clear, they simply cannot do it; *Illinois Brick* makes it impossible to proceed in these cases with the type of class that is here proposed.

The plaintiffs regularly have insisted that they can prove that the defendants, through horizontal conspiracy, established and controlled retail gasoline prices, that market forces thereby were superseded, and that dealer participation was insignificant. However, their explanations as to just how such control was exercised have been very general, somewhat vague, and occasionally inconsistent.

This court is mindful that the plaintiffs cannot be expected to prove their case at this stage of the proceedings. On the other hand, before certifying a class, I must be convinced that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been met, including particularly the predominance of common questions of fact and law and that the litigation would be

manageable. In doing so, I am not entitled to rely "... on the 'imagination' of [the plaintiffs] counsel to provide solutions that will, at some point in the future, prevent ... individual issues from splintering the action into thousands of individual trials requiring years to litigate." *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974). From all of the contentions, as best I can understand them, the conclusion appears unavoidable that either *Illinois Brick* precludes recovery of damages growing out of purchases from dealers, or that the relationships between the respective defendants and each of their individual dealers would have to be litigated. Neither of these alternatives would justify a class action of the nature here proposed.

[2] In urging that the participation of the retail dealers may be deemed inconsequential for class action purposes, the plaintiffs suggest, as one "string to their bow," that the defendants actively and vigilantly sought to persuade their dealers to adhere to the retail prices that the defendants recommended. However, for a wholesaler to recommend that its dealers charge a particular price is not a violation of laws against price fixing. To the extent that such efforts succeeded, they simply reflect the

amount of "pass on" of the alleged wholesale overcharge that *Illinois Brick* says we may not even consider.

The plaintiffs make much of the "dealer discounts" that the defendants, allegedly on a conspiratorially coordinated basis, granted to and withdrew from their respective dealers. But such activities directly operated only upon the *wholesale* prices. The "saw tooth" charts submitted by the plaintiffs show what appear to be general immediate increases in retail prices in apparent response to the withdrawal of dealer discounts. But such a showing, in itself, establishes only the obvious fact that wholesale prices are a very important factor in the fixing of retail prices. The charts, being averages, do not show, or even suggest, nondiscretionary, automatic, specific price increases by all dealers. Some of the dealers, probably most, may have raised their retail prices to pass on to their customers the full amount of the wholesale price increases occasioned by the withdrawal of dealer discounts. Others may have absorbed such increases in whole or in part. The defendants probably did make suggestions as to the retail prices and sought to persuade their dealers to follow them. The saw tooth charts suggest that these efforts met with considerable success. However, to

the extent that suggestion and persuasion were involved, discretion remained in the dealer, and *Illinois Brick* precludes the purchaser from looking beyond him to the defendant wholesaler.

[3] The plaintiffs also make the stronger contention that the defendants' influence upon their dealers in fixing retail prices went beyond recommendation or persuasion and amounted to coercion. Of course, for a wholesaler to use coercion to induce its dealers to accept its suggested retail prices constitutes a vertical conspiracy in violation of the Sherman Act. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45, 80 S.Ct. 503, 512, 4 L.Ed.2d 505 (1960). See also *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355 (9th Cir. 1976).

For several reasons, the present litigation cannot proceed as a class action to the extent that the plaintiffs may rely upon an ability to establish vertical conspiracies. In the first place, such issues necessarily involve individual questions as to how each of the many dealers reacted to the alleged coercive pressure. Some people are more susceptible to attempts at coercion than others. This very fact makes it impossible to conclude that dealer participation may be ignored. But the need to consider how the

thousands of dealers responded individually to the alleged coercion renders the case unmanageable as a class action. It also calls for inquiries that are precluded by *Illinois Brick*, namely, the extent to which the dealers gave way to coercion and passed on the artificially inflated charges to their own customers.

Also, in an earlier ruling in these cases (497 F.Supp. 218, 228 (C.D.Cal.1980)), this court held, for reasons therein discussed, that if the plaintiffs desire to pursue a theory of vertical conspiracy between the defendants and their dealers, they must join the dealers as defendants in the actions. The plaintiffs expressly have negated any intention so to do; and, of course, such a step would inject so many individual issues as to make a class action practically impossible.

A third possible theory upon which the plaintiffs suggest that they may be able to avoid the *Illinois Brick* wall is to show that the arrangements between the defendants and their respective dealers were such that the physical transfer of gasoline from the former to the latter did not involve a "real sales transaction". The contention appears to be that a dealer had title to the gasoline for only a brief moment in the course of the transfer from the defendant wholesaler to

the consumer. Therefore, as I understand the argument, the dealer's position as a buyer was fictional and may be ignored and the consumer's purchase may be considered to have been made directly from the defendant wholesaler.

The relationships between the defendants and their dealers have not yet been displayed thoroughly in this litigation. Nonetheless, it is hard to accept the proposition that the dealers have played such an insignificant role in the distribution of gasoline. On the contrary, affidavits have been submitted by more than one hundred dealers asserting that they regularly determine for themselves the prices that they charge their gasoline customers, and that in doing so they take into account various market factors, including, but not limited to, the prices that they are charged by the defendants.

[4] In any event, pursuit of the theory here discussed cannot support a class action. It describes a consignment relationship between defendant and dealer, and such a relationship is, in itself, a vertical conspiracy in violation of the antitrust laws. *Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). Thus, the plaintiffs would have to join, as defendants, all of the participating dealers, as was discussed in my earlier memorandum in this

matter (497 F.Supp. 218, 228 (C.D.Cal. 1980)).

From all of the foregoing, the conclusion appears inescapable that this court cannot properly ignore the participation of the retail dealers in the process of distributing gasoline from the defendants to the consumers. To do so would ignore the mandate of *Illinois Brick* and would fail to fulfill this court's obligation under Rule 23 of the Federal Rules of Civil Procedure.

The compelling nature of this conclusion is underlined by the current pendency of the antitrust litigation described in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977). It is a class action against most of the major oil companies that are defendants here, and is brought on behalf of all of their retail gasoline dealers. It charges the defendants with a horizontal conspiracy to require their dealers to acquiesce in anti-trust conduct as a condition to retaining their leases. Thus, the plaintiff class in *Bogosian* are seeking to recover, as direct purchasers, substantially the same dollars in damages that the present plaintiffs' proposed class are seeking, as indirect purchasers, from the same defendants. If the plaintiff class in *Bogosian* and the proposed plaintiff class here were both to succeed, the result would be the double recovery.

trebled, that *Illinois Brick* envisaged and sought to forestall.

This court is aware of the likelihood that its refusal to certify the proposed class means that there is no practical way in which damages may be recovered for most individual gasoline purchasers, no matter how much the constantly increasing prices that they have paid may have stemmed from antitrust conduct on the part of the wholesale suppliers. However, this is the mandate of the Supreme Court in *Illinois Brick*. That decision laid down the doctrine that use of the treble damages weapon in the enforcement of the antitrust laws should be left altogether to the direct purchaser.

Accordingly, the plaintiffs' motion for certification of the proposed plaintiff individual consumer class is denied.

Pursuant to Title 28 U.S.C. § 1292(b), this court is "... of the opinion that ... [the order herein rendered] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" Accordingly, such order is certified for interlocutory appeal.

* * * * *

APPENDIX C

**In re COORDINATED PRETRIAL PRO-
CEEDINGS IN PETROLEUM PROD-
UCTS ANTITRUST LITIGATION.**

MDL No. 150 WPG.

**United States District Court,
C. D. California.**

July 29, 1980.

Order Aug. 26, 1980.

**MEMORANDUM OF DECISION
REGARDING STANDING AND
ILLINOIS BRICK**

WILLIAM P. GRAY, District Judge.

The states of Arizona, California, Florida, Oregon and Washington have brought actions against several major oil companies, alleging violations of federal and state antitrust laws. These cases have been consolidated in this court for pretrial proceedings. The defendants have moved to dismiss certain portions of the complaints on the grounds that the plaintiffs lack standing to sue under the antitrust laws or that the rule in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) precludes the plaintiffs from proving certain types of damages.

The motions to dismiss are directed against two causes of action set forth in the complaints.¹ The first cause of action in each complaint accuses the defendants of conspiring to restrain or monopolize interstate commerce in "the production, transportation, and refining of crude oil and the distribution and marketing of refined [petroleum] products." The complaints allege that this was accomplished by using the existing structure of the petroleum industry, together with horizontal agreements and concerts of action in violation of sections 1 and 2 of the Sherman Act. The second cause of action asserts that the defendants combined or agreed to restrain or monopolize commerce by creating "an artificial scarcity of crude oil and refined petroleum products within the United States"

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1. The first two causes of action alleged in the Arizona, California, Oregon and Washington complaints are nearly identical. There are minor variations in language and some additional overt acts are alleged in the California and Oregon complaints. Florida's complaint makes the same general allegations as the other states but is different in many of the overt acts alleged. In all, however, the major claims of the five complaints are quite similar and will be treated as identical for purposes of this discussion.

and in each plaintiff state. The plaintiffs complain that they, and those on whose behalf they sue, have been damaged by the price increases for refined petroleum products that resulted from the alleged anti-trust violations.

I. *STANDING TO SUE FOR DAMAGES*

A. *Clayton Act § 4*

Each of the plaintiff states alleges that it is a purchaser or consumer of petroleum products. With the possible exception of Florida,² the plaintiffs' claims as purchasers are limited to purchases of refined petroleum products as opposed to crude oil. The claims for damages are made under Clayton Act § 4 which provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sus-

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2. Florida's complaint is broad enough to include purchases of crude oil. However, Florida has never suggested in any of its other papers or in oral argument that it purchased crude oil. For purposes of this discussion, Florida's claims will be treated as limited to purchases of refined products.

tained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

In addition to the claims made on their own behalf, the states also assert claims as *par-ens patriae* under Clayton Act § 4C (15 U.S.C. § 15C) and as representatives of two classes of consumers. The first consumer class consists of all government entities that purchase refined petroleum products within the respective plaintiff states. The second class is composed of all other consumers of refined products within such plaintiff states.

[1] Standing to sue under Clayton Act § 4 consists of two elements. The claimant must show that the alleged violation of the antitrust laws (1) directly caused injury (2) to the claimant's "business or property." Defendants' motions first challenge whether the plaintiffs as consumers are injured in their business or property within the meaning of the statute. This court previously has concluded that consumers are persons injured in their business or property (see the memorandum of decision dated September 15, 1977). Since then, the Supreme Court has reached the same conclusion on that issue in *Reiter v. Sonotone Corp.*, 439 U.S. 1065, 99 S.Ct. 830, 59 L.Ed.2d 30 (1979).

[2, 3] The remaining issue with regard to standing is whether the plaintiffs have alleged injury within the meaning of section 4. The Fifth and Ninth Circuits, in which the various consolidated cases arise, agree that the appropriate test for injury is the so-called "target area" test.³ *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), cert. denied sub nom. *Morgan v. Automobile Manufacturers Association*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 836 (1973). The "target area" is "that area of the economy which is endangered by a

3. The defendants argue in their papers that while the Fifth Circuit uses "target area" language to describe its test, it actually applies a more restrictive test for standing similar to the so called "direct injury" test applied by several other circuits. In *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976) a labor union and its members sued a tugboat firm and its union for conspiracy to monopolize tugboat services in the port of Mobile. The Fifth Circuit reversed a judgment dismissing the plaintiffs' claims and held that the plaintiffs, although employees, were within the area of the economy affected by the alleged violations and therefore had standing. This is very clearly an application of the "target area" test since the court focused on the economic impact of the violation rather than on the relationship between the parties.

break-down of competitive conditions in a particular industry." *Karseal Corporation v. Richfield Oil Corporation*, 221 F.2d 358, 362 (9th Cir. 1955). To apply the target area test, the area of the economy affected by the alleged violation must be identified, and then it must be determined whether the claimed injury occurred within that area. *In re Multidistrict*, 481 F.2d at 129.

[4] The first cause of action in the complaints of Arizona, California, Florida, Oregon and Washington alleges restraint of trade and monopolization in the petroleum industry as a result of the vertically integrated structure of that industry and certain horizontal combinations. The effects of these alleged violations are set forth most fully in the Washington complaint as follows:

"These violations of the Sherman Act have had the following effects, among others:

- a. The acquisition and control by defendants of substantially all foreign crude oil imports into PAD V [the West Coast market area].
- b. The acquisition or control by defendants of all California crude oil production.
- c. The acquisition or control by defendants of substantially all pipeline

transportation of crude oil within California and PAD V.

- d. The elimination of competition in the production of crude oil within California.
- e. Arbitrary and artificial prices at which crude oil is purchased and sold within California.
- f. Reduced competition in the sale of refined products within Washington and elsewhere in PAD V.
- g. Increases in prices of refined products to artificial and noncompetitively high levels within Washington and elsewhere in PAD V."

Washington and the other state plaintiffs claim that they were damaged by the effect of antitrust violations on the prices they paid for petroleum products. They are not purchasers of crude oil; they do not use pipelines or other transportation facilities for crude oil; nor do they produce crude oil or market it. Therefore, the alleged injury could occur only in the "target area" described in paragraphs (f) and (g) above, the refined product market, and the plaintiffs have standing to sue for damages only as to those violations which affected this market.

[5] The second cause of action in these five complaints asserts that the defendants conspired to restrain trade and monopolize commerce by creating an artificial scarcity of crude oil and refined petroleum products. With respect to this allegation, the Washington complaint, for example, states:

"These violations of the Sherman Act have had the following effects, among others:

- a. The prices of refined products within Washington and PAD V have been raised to artificial and noncompetitively high levels.
- b. Independent refiners have been deprived of lower price domestic crude oil.
- c. Competition by independent gasoline wholesales has been reduced.
- d. Customers for refined products have been allocated among defendants.
- e. Purchasers of refined products have been deprived of the benefits of free and open competition among the defendants and their co-conspirators and have been forced to pay more for refined products than they would otherwise have paid."

To the extent that the plaintiffs alleged that the conspiracy to create an artificial scarcity had an effect upon the refined pe-

roleum products market, the plaintiffs have standing to sue, that being the market in which they purchase. They do not have standing to sue for the effect of these acts upon the crude oil market or upon refiners of crude oil.

To summarize, the plaintiffs have alleged that they are purchasers of refined petroleum products. They have alleged further that the defendants restrained trade and monopolized commerce by engaging in certain horizontal combinations and agreements and by conspiring to create an artificial shortage of products. Finally, the plaintiffs have alleged that these illegal activities have had an effect upon the market for refined petroleum products. These allegations are sufficient to give the plaintiffs standing to sue under Clayton Act § 4. However, to the extent that the plaintiffs have alleged activities that are directed at crude oil exploration, production, importation, transportation or refining, the plain-

tiffs lack standing to sue for injuries occurring in those areas of the economy.⁴

B. Clayton Act § 4C

Section 4C of the Clayton Act provides, in part:

"Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such state, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title." 15 U.S.C. § 15c(a)(1) 1976).

The elements of standing contained in section 4 of the Act are also present in

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4. The conclusions reached in this section also apply to the claims made by Arizona and California that the conduct alleged in their complaints constitutes violations of the antitrust laws of their respective states. Both Arizona Revised Statutes § 44-1408 (Suppl.1979) and California Business and Professions Code § 16750 (West Suppl.1979) contain language similar to Clayton Act § 4. This court concludes that the standing conferred by these state statutes is identical to that conferred by Clayton Act § 4. See *Saxer v. Philip Morris, Inc.*, 54 Cal.App.3d 7, 26, 126 Cal.Rptr. 327, 338 (1975).

section 4C. The plaintiff must show, in addition to authority to sue as *parens patriae*, that the natural persons in the state sustained (1) injury (2) to their property "by reason of" a violation of the Sherman Act.

[6] The plaintiffs' *parens patriae* claims are based on the same allegations of misconduct as are the plaintiffs' proprietary claims, and to the extent that the plaintiffs have standing to sue under section 4, they have standing to sue for damages as *parens patriae* under section 4C of the Act.

II. STANDING TO SUE FOR INJUNCTIVE RELIEF

The plaintiffs also ask for injunctive relief against the defendants under Clayton Act § 16 which provides:

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that causes loss or damage is granted by courts of equity." 15 U.S.C. § 26 (1976).

[7, 8] It has been observed frequently that the standing requirements under section 16 are broader than those under section 4 of the Act. To have standing under section 16, a plaintiff must show (1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violation. *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979); *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1977). In meeting the first requirement, it must be alleged that the claimant will suffer irreparable harm and that there is no adequate remedy at law. 14 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 105.02[8] (1978). Only the Washington complaint expressly alleges irreparable injury to the state, its citizens and the members of the consumer classes. However, all of the state plaintiffs allege that defendants are engaged in continuing violations of the antitrust laws and that this conduct results in injuries to the plaintiffs. Injuries from continuing violations of regulatory statutes are cognizable in courts of equity, and therefore the complaints will be construed liberally to meet the first requirement for standing under section 16.

The requirement that the plaintiffs show that their injuries were proximately caused

by the alleged antitrust violations is essentially the same under sections 4 and 16 of the Clayton Act. It already has been concluded that plaintiffs have standing under section 4 to sue for violations of the antitrust laws that affect the market for refined petroleum products. Plaintiffs likewise have standing to seek injunctive relief under section 16 within the same limits.

[9] As the Supreme Court noted in *Hawaii v. Standard Oil of California*, 405 U.S. 251, 261, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972) "... one injunction is as effective as 100." It is of little practical significance that a state has standing to sue for injunctive relief as *parens patriae* if the state also has standing to sue for injunctive relief in its proprietary capacity. For whatever it is worth, this court must conclude that plaintiffs have standing to sue for injunctive relief as *parens patriae* within the limitations previously mentioned.

III. ILLINOIS BRICK

The decision of the Supreme Court in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) has had a significant impact on the scope of private antitrust enforcement under Clayton Act § 4. It held that an indirect purchaser from a person that violates the antitrust laws

may not recover damages in an action under section 4. The Court rejected the argument that the claimant could prove damages by showing that the direct purchaser, a middleman that was charged an excessive price by the wrongdoer, passed on all or some of the overcharge to the claimant. The rationale for this decision was that (1) allowing proof of passed-on overcharges would greatly complicate antitrust treble damage suits, (2) defendants would be threatened with multiple liability if suits were brought by both direct and indirect purchasers, and (3) permitting use of the pass-on theory would give both direct and indirect purchasers inadequate incentive to sue since neither could recover the full amount of the overcharge.

The Supreme Court suggested two narrow exceptions to its rule against indirect purchaser claims. These exceptions were mentioned in the course of a discussion of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), in which the Court had held that an antitrust defendant could not avoid payment of damages to a direct purchaser by claiming that some of the overcharge had been passed on to someone else. In *Illinois Brick*, the Court acknowledged that the reasons for the *Hanover Shoe* rule

would not apply where the indirect purchaser had a contract with the direct purchaser for a fixed quantity of goods to be priced at cost plus a specific markup and such contract pre-dated the antitrust activity of the defendant. In a footnote to this discussion, the Court suggested a second exception, that the pass-on defense might be permitted where the direct purchaser "is owned or controlled by its customer." 431 U.S. at 736, n.16, 97 S.Ct. at 2070, n.16.

A. *Claims Alleging Conduct (Other Than Price Fixing) Aimed at Crude Oil Producers, Refiners and Marketers*

[10] This court has already concluded that the plaintiffs lack standing to sue for antitrust violations affecting crude oil production, refining, or marketing. Even if the plaintiffs had standing in these areas, *Illinois Brick* would prevent the plaintiffs from recovering damages. Anticompetitive activity at levels of the petroleum industry above the wholesale and retail marketing levels, except as incidental to a price fixing conspiracy involving wholesale or retail prices, would injure plaintiffs only indirectly. *Illinois Brick* provides an independent ground for dismissal of such claims.

B. Price Fixing Claims

[11] The rule of *Illinois Brick* is that in private antitrust actions under Clayton Act § 4, the claimant may recover only for damages incurred in a purchase directly from the wrongdoer. Subject to the following three exceptions, this is the rule that will be applied to plaintiffs' price fixing claims.

[12] First, the plaintiffs may recover from the defendants for any illegal overcharges paid directly to the defendants' co-conspirators. In *City of Atlanta v. Chattanooga Founding and Pipeworks*, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906) a municipality that bought pipe from conspiring pipe manufacturers was allowed to recover from the defendant for overcharges paid to the defendant's co-conspirator. The reason for this result is that conspirators are mutual agents and each is liable for the acts of the other. *Illinois Brick* does not alter this rule since no pass-on of overcharges is involved.

[13] Second, the plaintiffs may recover from the defendants for indirect purchases made under pre-existing, fixed-quantity, cost-plus contracts with the direct purchaser. In announcing its decision in *Illinois Brick*, the Supreme Court made it clear that "[the] use of pass-on will be permitted sym-

metrically, if at all." 431 U.S. at 737, n.18, 97 S.Ct. at 2070, n.18. The Court recognized an exception to *Hanover Shoe* where the direct and indirect purchasers have a pre-existing cost-plus contract, and this exception must be applied to the benefit of both plaintiffs and defendants. None of the plaintiffs in the present cases has alleged that they were parties to such contracts, although Washington asserts that it suffered damage "in connection with purchases under circumstances which are the economic equivalent of pre-existing cost-plus contracts." (Washington is also the only state plaintiff to have had the benefit of reading the *Illinois Brick* decision before filing its complaint.) To the extent that a plaintiff can allege and prove that it held pre-existing, fixed-quantity, cost-plus contracts with its suppliers, it may avoid the impact of *Illinois Brick*. The court cannot at this time decide whether there are other circumstances that are the "economic equivalent" of cost-plus contracts or whether such circumstances would be recognized as exceptions to the *Illinois Brick* rule.

[14] Third, the plaintiffs will be allowed to recover from the defendants for overcharges passed on by entities owned or controlled by the defendants. In connection with its discussion in *Illinois Brick* of the rule in *Hanover Shoe*, the Supreme Court, in the now famous footnote 16, stated:

"Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736, n.16, 97 S.Ct. at 2070, n.16.

At least two federal circuits⁵ appear to have recognized that the reasoning behind the footnote 16 exception applies to both offensive and defense uses of the pass-on theory.

In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3rd Cir. 1978) involved allegations of price fixing by sugar refiners. The plaintiff, a wholesale distributor of candy, purchased candy from a subsidiary of one of the defendant refiners. The district court entered summary judgment for the defendants on the basis of *Illinois Brick*. The Third Circuit reversed and held that the subsidiary would be treated as the alter ego of the parent sugar refiner. "To adopt any other view would invite evasion by the simple expedient of inserting a subsidiary between the violator and the first noncontrolled purchaser." 579 F.2d at 19.

5. In *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979) the Fifth Circuit discussed a "control" exception to *Illinois Brick* but concluded that such an exception would not apply in the case before it.

In *Royal Printing, Inc. v. Kimberly-Clark Corporation*, 621 F.2d 323 (9th Cir. 1980) the Ninth Circuit recognized a control exception to *Illinois Brick* by permitting a purchaser of paper products to sue paper manufacturers for antitrust violations even though the plaintiff had made its purchases through divisions or subsidiaries of the defendant manufacturers. The marketing entities carried the products of their parent corporations and other paper manufacturers, so that, in some purchases, the manufacturer did not own the supplier, but the supplier was owned by one of the participants in the conspiracy. The Ninth Circuit recognized that there was a small chance that the marketing companies might sue the parent or its co-conspirator and that there was a remote chance of imposing multiple liability on the defendants, but concluded that the broader interest in effective antitrust enforcement required that the indirect purchaser be allowed to bring suit in this situation.

[15] On the basis of these decisions, this court is able to conclude that an indirect purchaser that purchases from an entity owned or controlled by the wrongdoer may sue to recover passed-on overcharges and is excepted from the general rule of *Illinois Brick*. The question of how much control is

required to meet the exception cannot be decided until a factual record is developed. The degree of ownership, profit taking, or ability to set prices will be important considerations in determining whether the intermediate seller is "controlled."

To summarize, with respect to the plaintiffs' claims that the defendants conspired to fix prices either at the wholesale or retail level, the plaintiffs will be allowed to seek recovery only as to direct purchases from a defendant, a co-conspirator, sellers with whom the plaintiffs had pre-existing, fixed-quantity, cost-plus contracts, or an entity controlled by a conspirator.

C. *The Umbrella Theory*

[16] The plaintiffs have argued that where a price fixing conspiracy exists in a market, non-conspirators are able to charge higher prices than in a competitive market. The price fixed by the conspiracy is said to create a price "umbrella" allowing non-conspirators in the market to raise their prices. The plaintiffs contend that a purchaser from a non-conspirator should be allowed to recover from the conspirators the difference between the competitive market price and the higher price in the constricted market. The plaintiffs correctly observe that *Illinois Brick* does not specifically address this situation since the price charged by

non-conspirators does not contain any overcharge passed on from the defendants. However the reasoning behind *Illinois Brick* is applicable to the umbrella pricing theory and prompts this court to conclude that recovery should not be allowed under such a theory.

This court will follow the decision of the Third Circuit in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979). The defendants in that case were accused of fixing the price of paper packaging for consumer goods. The Court of Appeals affirmed a grant of summary judgment dismissing the suit as to a plaintiff, Murray's, which purchased paper bags from a non-conspiring competitor of the defendants at prices allegedly made possible only by the umbrella effect of the conspirators' prices. The court rejected the umbrella theory for three reasons. First, Murray's had no direct relationship with the defendants and the defendants gained nothing from Murray's purchases. Second, the non-conspiring competitors were free to set prices as they wished and might have charged the same price without regard to the defendants' conduct. Third, the anti-trust laws would be enforced most effectively by the direct purchasers from the defendants.

The result in the *Mid-West* case is consistent with the teachings of *Illinois Brick*. *Illinois Brick* limited proof of passed-on overcharges because (1) such proof would involve complex economic analysis, (2) the defendant might be exposed to multiple liability and (3) the effectiveness of the treble damage remedy might be destroyed. Similar problems are involved in the umbrella theory of recovery.

First, proof of injury under the umbrella theory would involve complex economic analysis. The non-conspirator makes independent decisions concerning price and output. In order for a plaintiff to recover, the effect of the umbrella price on these pricing and output decisions would have to be shown. This sort of analysis is exactly what the Supreme Court sought to avoid in *Illinois Brick*.

Second, where the plaintiff is allowed to recover from a defendant for excessive prices charged by a non-conspirator, the defendant is not disgorging illegally earned profits—these have gone to the competitor. There is a possibility for ruinous recovery in allowing treble damages to be awarded in such circumstances.

Third, the direct purchaser from the defendant is the most effective enforcer of the antitrust laws. In a price fixing situation, both purchasers from the defendant and purchasers from non-conspirators are potentially injured. The purchaser from the non-conspirator might be able to prove price fixing by the defendant but be unable to quantify the injury. Normally, the direct purchaser would have much less difficulty in this respect. The direct purchaser has the greatest incentive to sue and the easiest case to prove and would be, therefore, the most effective enforcer of the antitrust laws.

For these reasons, the plaintiffs will not be allowed to prove damages incurred in purchases from non-conspiring competitors of the defendants. Claims based on such purchases will be dismissed.

D. *Vertical Conspiracy*

The plaintiffs have suggested in their papers that they may be able to prove a conspiracy between the defendant oil companies and the independently owned retail service stations that sell defendants' refined products under brand names. The plaintiffs assert that proof of such a vertical conspiracy would not be barred by *Illinois Brick*. There is authority for plaintiffs'

arguments in *Gas-A-Tron v. American Oil Company*, 1977-2 Trade Cases (CCH) ¶ 61,789 (D.Ariz.1977).

However, the plaintiffs have not, as yet, alleged a vertical conspiracy between the oil companies and retail dealers. This court is not inclined to entertain such an allegation unless such retail dealers are joined as defendants in these lawsuits. The reasons for requiring joinder of co-conspirators are set forth in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). In that case, cattle producers sued retail supermarkets for setting depressed beef prices. In order to avoid the impact of *Illinois Brick*, the plaintiffs offered to amend their complaints to allege that the supermarkets had conspired with packers and slaughterhouses to set market prices for beef cattle. The plaintiffs contended, as do plaintiffs in this action, that such a conspiracy would be excepted from the rule in *Illinois Brick*. The Fifth Circuit responded as follows:

"Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding

one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains.

Because the packers are not parties to this suit, the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable." 600 F.2d at 1163.

Accord, Dart Drug Corporation v. Corning Glass Works, 480 F.Supp. 1091 (D.Md.1979).

[17] The plaintiffs are entitled to prove their case by showing that the defendant oil companies conspired with retail dealers to set prices at the retail level. However, if they intend to pursue this theory of liability, they must allege a vertical conspiracy in their complaints and join the retail dealers as parties defendant.

E. Injunctive Relief

[18] The defendants have argued in their motions that *Illinois Brick* places the same limitations on claims for injunctive relief as on suits for damages. The defendants reason that since the plaintiffs must show injury to obtain injunctive relief and since proof of injury to an indirect purchaser would involve the same complex calculations as proof of damages, *Illinois Brick* bars recovery.

This argument has been rejected by the Third and Fifth Circuits and a district court in Maryland. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979); *In re Beef Products Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979); *Dart Drug Corporation v. Corning Glass Works*, 480 F.Supp. 1091 (D.Md.1979). The courts have reasoned that, first, in a suit for injunctive relief the plaintiff does not have to quantify his injury and therefore complex economic analysis is not necessary. Second, the defendant in a suit for injunctive relief is not threatened with multiple liability since no damages are awarded. Third, a bar against suits for injunctive relief by indirect purchasers would leave a significant gap in antitrust enforcement where the federal government or direct purchasers are unwilling to bring suit. Therefore none of the reasons given for the

rule in *Illinois Brick* apply to claims for injunctive relief under section 16. This court accepts the above-mentioned reasoning and will follow it in the present case.

IV. CONCLUSION

For the reasons expressed above, the defendants' motions to dismiss will be granted in part and denied in part as follows:

First, claims of conduct, other than price fixing, directed against the exploration, production, transportation, marketing or refining of crude oil will be dismissed for lack of standing under Clayton Act §§ 4 and 4C.

Second, even if the plaintiffs had standing to sue for damages resulting from anti-trust violations other than price fixing in the exploration, production, transportation, marketing or refining of crude oil, *Illinois Brick* would prevent them from proving damages and would require that these claims be dismissed.

Third, to the extent that the plaintiffs claim that the defendants violated the anti-trust laws by setting or manipulating prices at the wholesale or retail levels, the plaintiffs will be allowed to seek damages only as to direct purchases from defendants, their co-conspirators, sellers with whom plaintiffs had fixed-quantity, cost-plus

contracts pre-dating the alleged violations, or entities owned or controlled by defendants.

Fourth, the plaintiffs will not be allowed to recover damages for purchases made from firms that competed with defendants but did not conspire with them to violate the antitrust laws.

Fifth, the plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the retail dealers are joined as parties defendant.

Sixth, the plaintiffs are entitled to seek injunctive relief for antitrust violations directed against the refined product market regardless of whether the plaintiffs purchased directly or indirectly from the defendants.

REVISED ORDER REGARDING STANDING AND ILLINOIS BRICK

The order filed by this court on July 29, 1980, regarding standing and *Illinois Brick* is hereby withdrawn and the following substituted:

For the reasons set forth in the memorandum of decision accompanying this order, IT IS HEREBY ORDERED:

First, all claims of antitrust violations directed against the exploration, production, transportation, marketing or refining of crude oil, other than claims of fixing wholesale or retail prices of refined products, are dismissed.

Second, to the extent that the plaintiffs claim that the defendants violated the antitrust laws by setting or manipulating prices at the wholesale or retail levels, the plaintiffs will be allowed to seek damages only as to direct purchases from the defendants, their co-conspirators, sellers with whom plaintiff had fixed-quantity, cost-plus contracts pre-dating the alleged violations, or entities owned or controlled by the defendants or their co-conspirators.

Third, all claims for damages based on purchases from firms that competed with the defendants but did not conspire with them to violate the antitrust laws are dismissed.

Fourth, the plaintiffs may amend their complaints to allege that defendants conspired with retail dealers of petroleum products only if the conspiring retail dealers are joined as parties defendant.

Fifth, the plaintiffs may seek injunctive relief for antitrust violations directed against the refined product market regardless of whether the plaintiffs purchased directly or indirectly from defendants or their co-conspirators.

* * *

APPENDIX D

15 U.S.C. Section 1

Trusts, etc., in restraint of trade illegal;
penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX E

15 U.S.C. Section 15

Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.